SECRETARY OF LABOR, Complainant,	:	
v.	:	OSHRC Docket No. 94-1460
DREXEL CHEMICAL CO., Respondent.	:	

Appearances:

Michael K. Hagan, Esquire
Office of the Solicitor
U. S. Department of Labor
Atlanta, Georgia
For Complainant

Hunter Hanshaw, Esquire
Drexel Chemical Company
Memphis, Tennessee
For Respondent

Before: Administrative Law Judge Ken S. Welsch

DECISION AND ORDER

Drexel Chemical Company (Drexel) seeks attorney's fees and expenses in accordance with the Equal Access to Justice Act, 5 U.S.C. § 504, and implementing regulations at 29 C.F.R. § 2204.101, *et seq.*, for costs incurred in its defense against citations and proposed penalties issued by the Occupational Safety and Health Administration (OSHA) on April 25, 1994.

Procedural History

Drexel is a producer of agricultural chemicals with a plant in Cordele, Georgia. On March 2, 1994, the Occupational Safety and Health Administration inspected the plant. Drexel received a serious citation and an "other-than-serious" citation. The serious citation alleged eighteen violations of various regulations and proposed penalties totaling $12,950. Drexel contested the citations except for citation No. 1, items 3a, 11a, 11b and the "other-than-serious" citation No. 2. Prior to the hearing, the Secretary withdrew citation No. 1, item 3b.

A hearing was held in Macon, Georgia, on February 1 and 2, 1995. As the a result of the hearing, citation No. 1, items 1, 2, 3c, and 4d were vacated and the remaining items were affirmed. The total penalties for the uncontested items and those serious items affirmed was $6,250.

Drexel petitioned the Commission to review the decision affirming items 4a, 4b, 4c, 5 and 6. On March 3, 1997, the Review Commission vacated items 4a and 4b and affirmed items 4c, 5 and 6. On March 31, 1997, Drexel filed its application for attorney's fees and expenses pursuant to the EAJA. Drexel seeks $4,046.25 in fees and $1,917.94 in expenses. The Secretary objects.

Equal Access to Justice Act

The Equal Access to Justice Act (EAJA) applies to proceedings before the Commission through section 10(c) of the Occupational Safety and Health Act of 1970 (Act), 29 U.S.C. § 651, *et seq.* The purpose of the EAJA is to ensure that an eligible applicant is not deterred from seeking review of, or defending against, unjustified actions by the Secretary. *K.D.K Upset Forging Inc.,*12 BNA OSHC 1857, 1859, 1986 CCH OSHD ¶ 27,612 (No. 81-1932, 1986). An award is made to an eligible applicant who is the prevailing party, and if the Secretary's action is found to be without substantial justification and there are no special circumstances which make the award unjust. *Asbestos Abatement Consultation & Engineering,* 15 BNA OSHC 1252, 1991 CCH OSHD ¶ 28,628 (No 87-1522, 1991). While the applicant has the burden of proving eligibility, the Secretary has the burden of demonstrating that her action was substantially justified. 29 C.F.R. § 2204.106(a). However, the EAJA does not routinely award attorneys' fees and expenses to a prevailing party. There is no presumption that the Secretary's position was not substantially justified, simply because she lost the case. Also, it does not require that the Secretary's decision to litigate be based on a substantial probability of prevailing. *See S & H Riggers & Erectors, Inc. v. OSHRC,* 672 F.2d 426, 430 (5th Cir. 1982).

Eligibility

Drexel's EAJA application was timely filed within thirty days of the Review Commission's Decision issued March 3, 1997. The Commission received Drexel's application on April 1, 1997.

Additionally, the applicant in an EAJA case must establish that on the date of its notice of contest it is a "partnership, corporation, association, or public or private organization that has a net worth of not more than $7 million and employs not more than 500 employees." 29 C.F.R. § 2204.105. Drexel's Secretary-Treasurer affies that Drexel's net worth is not more than $7

million and it employs fewer than 500 employees. In support, Drexel attaches its net worth statement dated December 31, 1993.[1] The Secretary does not dispute Drexel's eligibility.

Drexel's application establishes Drexel's eligibility at the time of its notice of contest.

Prevailing Party

To be considered the "prevailing party," the record must show that Drexel succeeded on any significant issues involved in the case and achieved some of the benefit it sought in pursuing litigation. *K.D.K. Upset Forging, Inc*., 12 BNA OSHC 1856, 1857, 1986 CCH OSHD ¶ 27,612 (No. 81-1932, 1986). It is not necessary for Drexel to have prevailed on all issues but only as to a "discrete substantive portion of the proceeding." *H.P. Fowler Contracting Corp*., 11 BNA OSHC 1841, 1845, 1983-84 CCH OSHD ¶ 26,830, p. 34,358 (No. 80-3699, 1984).

Drexel asserts that it is the prevailing party as to items 1, 2, 3c and 4d which were vacated by the court; item 9 which was reclassified to "other-than-serious" with no penalty; item 3b which was withdrawn by the Secretary prior to the hearing; and items 4a and 4b which were vacated by the Commission on review.

The Secretary concedes, and the record supports, that Drexel is the prevailing party as to items 1, 2, 3b, 3c, 4a and 4b (Secretary's Answer; p. 6). The Secretary, however, argues that Drexel is not the prevailing party as to vacated item 4d or as to item 9 which was affirmed as "other-than-serious" with no penalty.

Item 4d, alleged violation of § 1910.146(d), was vacated as duplicative of item 4c, violation of § 1910.146(c)(4). Item 4c was affirmed by the court and the Review Commission. Section 1910.146(c)(4) requires an employer to develop and implement a written permit space program which includes the specific requirements identified in § 1910.146(d). The court and Review Commission did not find that Drexel complied with the requirements of § 1910.146(d). On the contrary, Drexel's program was specifically found lacking these requirements in affirming the violation of § 1910.146(c)(4) (item 4c). As noted by the Secretary, it was a matter of form in pleading rather than substance. Further, since item 4d was grouped with item 4c, Drexel was not

[1] Drexel's net worth exhibit was sealed from disclosure by Court Order dated May 16, 1997, pursuant to Drexel's motion for protective order claiming the information as confidential and exempt from disclosure under the Freedom of Information Act, 5 U.S.C. § 552(b)(4).

shown to have derived any benefit in vacating the violation. Therefore, Drexel was not a prevailing party as to item 4d.

With regard to item 9, violation of § 1910.303(b)(2), the violation was affirmed but reclassified as "other-than-serious" with no penalty. The Secretary argues that the reclassification does not constitute a discrete substantive portion of the case and, thus, Drexel is not the prevailing party. In deciding whether the reclassification constitutes as discrete substantive portion, the determination is based on all relevant facts and circumstances. *H.P. Fowler Contracting Corp.,* 11 BNA OSHC 1841, 1846, 1983-84 CCH OSHD ¶ 26,830, p. 34,358 (No. 80-3699, 1984). Although Drexel did not dispute the violation at the hearing, it did challenge the serious classification (Drexel's Post Hearing Brief, p. 31). The resulting decision was what Drexel sought in litigation. Accordingly, Drexel was the prevailing party as to item 9.

Substantial Justification

Having established that Drexel was the prevailing party as to items 1, 2, 3b, 3c, 4a, 4b and 9, Drexel may be entitled to an award of fees and expenses unless the Secretary establishes that her position was substantially justified in pursuing litigation or the record shows special circumstances which make an award unjust. "The test of whether the Secretary's action is substantially justified is essentially one of reasonableness in law and fact." *Mautz & Oren, Inc.*, 16 BNA OSHC 1006, 1991-1993 CCH OSHD ¶ 29,986, p. 41,066 (No. 89-1366, 1993). The Secretary must show that there is a reasonable basis for the facts alleged; for the theory she propounds; and that the facts alleged will reasonably support the legal theory advanced. *See Gaston v. Bowen*, 854 F2d. 379, 380 (10th Cir. 1988). The fact that the Secretary may have lost as to these items does not mean that her position in pursuing them in litigation was not substantially justified. *S & H Riggers & Erectors, Inc. v. OSHRC, supra,* at 430. In cases before the Commission, facts need to be proved by only a preponderance of the evidence, not by clear and convincing evidence or beyond a reasonable doubt. The EAJA should not be read to deter the Secretary from pursing in good faith, cases which are reasonable in advancing the objective of workplace safety and health, if such cases are reasonably supportable in fact and law. The facts forming the basis of the Secretary's position need not be uncontradicted. If reasonable persons fairly disagree whether the evidence establishes a fact in issue, the Secretary's evidence can be said to be substantial.

Applying this analysis, the record establishes that the Secretary was substantially justified in pursuing litigation for each item which Drexel seeks fees and expenses except item 3b.

Item 1 - § 1910.20(g)(1)(i)

The Secretary's evidence showed that employees worked with hazardous chemicals including Diazinon and Malathion which are cholinesterase-inhibiting chemicals that could affect an employee's central nervous system. Drexel's former plant manager told OSHA during the inspection that he was not familiar with the requirements of the standard and that test results were not maintained. Also, an employee told the inspector that he was not familiar with any medical records. At hearing, Drexel's current plant manager and a warehouse worker contradicted the testimony of the inspector. After weighing the testimony and credibility, it was concluded that the Secretary failed by a preponderance of the evidence to met her burden of proof. However, the Secretary's evidence established a prima facie showing of a violation. Credibility determinations which are not resolved in favor of the Secretary do not render the Secretary's position as not substantially justified. If the credibility determinations had been resolved in favor of the Secretary, they would have supported the Secretary's claim of violation. *See Consolidated Construction, Inc.,* 16 BNA OSHC 1001, 1006, 1991-93 CCH OSHD ¶ 29,992, p. 41,076 (No. 89-2839, 1993).

Accordingly, the Secretary was substantially justified in alleging violation of § 1910.20(g)(1)(i) (item 1).

Item 2 - § 1910.23(c)(1)

The court's decision found that the elevated platform used for the batching operation did not comply with the standard and Drexel knew of the unguarded open-side. The decision vacating the violation rested solely on insufficient evidence of employee exposure. Drexel did not dispute that there were no guardrails or equivalent along the open-side of the batching platform. The batching operator worked on the elevated platform emptying large bags into the batching hopper. The operator worked approximately four feet from the open-side. However, the bags during the batching operation were placed along the platform's exposed open-side. Based on the positioning of the bags on the platform, it was concluded that the Secretary failed to establish that the operator was exposed to a fall hazard.

The Secretary evidence established a prima facie case of employee exposure. Although not found sufficient, the Secretary showed exposure particularly when the pallets were almost empty of bags (Tr. 338). The court's decision was based on the detailed description of the batching operation which Drexel referred to as "work in progress." Changes were being made to the batching operation at the time of OSHA's inspection.

Accordingly, the Secretary was substantially justified in alleging violation of § 1910.23(c)(1).

Item 3b - § 1910.134(b)(10)

This item was withdrawn by the Secretary prior to the hearing. No evidence was taken as to the allegation. The Secretary acknowledges that she withdrew the violation because "the cited standard uses the word 'should' rather than 'shall,' and is, therefore, under applicable Commission precedent, not a mandatory standard" (Agreed Prehearing Statement, p.5). In a similar EAJA case, the Commission found the Secretary not substantially justified in seeking a "should" standard charge. *William B. Hopke*, 12 BNA OSHC 2158, 1986-87 CCH OSHD ¶ 27,729 (No. 81-206). However, unlike in the *Hopke* case where the Secretary pursued the matter through hearing and the Review Commission, this item was withdrawn by the Secretary prior to hearing.

The Secretary lacked substantial justification for citing the standard. The amount, if any, of fees and expenses which Drexel may be entitled will subsequently be discussed.

Item 3c - §1910.134(e)(5)(i)

The Secretary's evidence established a prima facie violation of the standard. The inspector testified that he observed an employee washing out a 55-gallon drum used for insecticides. The employee was wearing a half-face mask respirator. He described the employee has having a "shaggy beard" covering his cheeks and neck. According to the inspector, the beard prevented the respirator from achieving a good face seal. Although no test was made of the seal and the photograph failed to clearly show a beard, the standard advises that beards may prevent a good face seal.

At hearing, the employee contradicted the inspector's testimony by denying that he was washing out drums at the time of the OSHA inspection. He also denied wearing the respirator except to demonstrate for the inspector. The court's determination vacating this item turned on

the weight of evidence. The Secretary was unable to establish a violation based on the preponderance of the evidence. However, the inspector's observations established justification to litigate the item.

Accordingly, the Secretary was substantially justified to allege a violation of § 1910.134(e)(5)(i) (item 3c).

Item 4a - § 1910.146(c)(1)

Violation of § 1910.146(c)(1) was affirmed by the court and vacated by the Review Commission. The Commission accepted the reasonableness of the Secretary's interpretation that an initial evaluation requires identifying each permit space in the workplace (*Decision* p. 3). The Commission vacated the item on finding that Drexel's plant manager had made a sufficient evaluation of the permit spaces based upon his knowledge of the equipment and machines from numerous visits to the plant. Although recognizing that Drexel's written program was incomplete, the Commission was satisfied that an evaluation was conducted.

There was no prior Commission decision interpreting the requirements for making an initial evaluation. The Secretary was justified in pursuing her interpretation. This court agreed with the Secretary's interpretation. The Secretary's pursuit of the alleged violation was reasonable in law and fact. Drexel's regulatory manager acknowledged at hearing that he was "not *per se* evaluating the sites" and that the same written program was used at all three of Drexel's plants (Tr. 196, 213).

Accordingly, the Secretary was substantially justified in pursing alleged violation of § 1910.146(c)(1) (item 4a).

Item 4b - § 1910.146(c)(2)

The standard requires posting signs or other effective means of informing employees of the danger posed by permit-required confined spaces. Drexel did not dispute that signs were not posted at the permit spaces. This court affirmed the violation and the Review Commission vacated it on review. The Commission's decision relied on evidence of employee training and access restrictions to the permit spaces.

The Commission's decision interprets "other effective means of informing employees" to include employee training. However, the Commission recognized that the record provided no details of the training. There were no prior decisions interpreting the standard and the Secretary's

position was reasonable in law and fact. In the absence of a settled interpretation by the Commission, the Secretary is substantially justified in proceeding based on a reasonable legal theory. *Mautz & Oren, Inc., supra,* 16 BNA OSHC at 1011, 1993 CCH OSHD ¶ 29,986, p. 41,068). Further, the Review Commission did determine that Drexel's written permit space program was inadequate and did not comply with the requirements of § 1910.146(c)(4) (item 4c).

Accordingly, the Secretary was substantially justified in citing violation of § 1910.146.(c)(2) (item 4b).

Item 9- § 1910.303(b)(2)

In affirming the violation of § 1910.303(b)(2), the court reclassified the violation as "other- than-serious" with no penalty. The reclassification did not affect the nature of the violative condition cited, Drexel's requirement to abate the condition and OSHA's enforcement if Drexel violates the standard in the future. In deciding whether a violation is serious, the evidence must show that the expected injury caused by the violative condition could result in serious injury or death. The issue is not whether an accident is likely to occur; it is rather, whether the result would likely be death or serious harm if an accident should occur. *Whiting-Turner Contracting Co*. 13 BNA OSHC 2155, 2157, 1989 CCH OSHD ¶ 28,501, p. 37,772 (No. 87-1238, 1989). The distinction from an "other-than-serious" violation, is the nature of the expected injury. In this case, the inspector testified that the expected injury would be minor burns or shock. A shock hazard, under certain conditions, could cause serious injury.

Accordingly, the Secretary was substantially justified in pursuing a serious violation of § 1910.303(b)(2) (item 9).

No Special Circumstances

There is no showing of special circumstances that would render an award of attorney's fees and expenses unjust. Therefore, Drexel may be entitled to an award of fees and costs under the EAJA for the Secretary's lack of substantial justification in citing § 1910.134(b)(10) (item 3b).

Drexel's Application for Fees and Expenses

In determining allowable fees and expenses under the EAJA, 29 C.F.R. § 2204.107 provides that such awards should be based on rates customarily charged by persons engaged in the business and that the fee should not exceed $75 per hour.

Drexel's application claims attorney's fees of $4,046.25 based on $75 per hour for a total of 53.95 hours of work. Also, there is an additional claim of $1,917.94 in expenses in handling the case. A review of Drexel's application reflects that the attorney's hours and expenses do not appear excessive. However, the application does not reflect that the fees and expenses are limited to only the citation items which were vacated by this court or the Review Commission. There is no segregation shown from those items which were affirmed and for which Drexel has no claim as a prevailing party.

In this case, it is concluded that the Secretary was not substantially justified in citing item 3b, violation of § 1910.134(b)(10). Drexel's application is not segregated based on its costs in defending against this violation. Thus, the precise amount of fees or expenses incurred in defending against item 3b is impossible to ascertain.

In determining an appropriate fee, consideration is given to the complexity of the violation and the experience of the attorney. In this regard, Drexel was cited under an unenforceable standard which the Secretary withdrew prior to the hearing. The standard was unenforceable as a matter of law and did not necessitate Drexel to engage in discovery or other legal work to prevail. Further, there is no showing that this item had a bearing on Drexel's decision to contest the citations which consisted of eighteen separate items. In reviewing the court's record, Drexel's answer and prehearing brief did not raise the invalid standard defense. Also, Drexel's attorney is an experienced attorney and the issue of the validity of the standard is not viewed as complex or difficult. No time or expense by Drexel is shown reasonable or appropriate in defending against the violation. The violation was voluntarily withdrawn by the Secretary upon recognizing an invalid standard. Any time spent by Drexel in obtaining this outcome was negilible. 29 C.R.R. § 2204.107(c)(4) expressely reguires the judge to consider "the difficulty or complexity of the issues" in determining the reasonableness of the fees and expenses requested.

Accordingly, no fees or expenses are awarded.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Rule 52(a) of the Federal Rules of Civil Procedure.

ORDER

Based upon the foregoing decision, it is

ORDERED: Drexel's application for attorney fees and expenses is denied.

KEN S. WELSCH
Judge

Date: June 25, 1997